Haselwood v. Bremerton Ice Arena, Inc.
Dissent by Alexander, C.J.

No. 80411-7

ALEXANDER, C.J. (dissenting)—In my judgment, we should reverse the portion of the Court of Appeals' decision in which that court holds RV Associates, Inc.'s (RV) lien on the improvements it made to the city of Bremerton's (City) property is superior to Charles and Joanne Haselwood's deed of trust. Because the concession agreement between the City and Bremerton Ice Arena (BIA) plainly states that the improvements shall remain the personal property of BIA during the term of the agreement, RV's lien is not "upon any lot or parcel of land" within the meaning of RCW 60.04.061.[1] Thus, the statute does not apply to RV's lien and, as such, the lien does not relate back to the date RV first delivered equipment to the City's property. RV's lien is, therefore, inferior to the Haselwoods' deed of trust. In addition, I disagree with the majority's reasoning on the question of RV's attorney fees request. Accordingly, I dissent.

[1]RCW 60.04.061 provides: "The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant."

PRIORITY

The majority errs in affirming the Court of Appeals' conclusion that RCW 60.04.061 applies to RV's lien on the improvements. Majority at 12-13 (citing *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 188, 155 P.3d 952 (2007)). In my view, the Court of Appeals' decision in this regard contradicts Washington common law and conflicts with the legislative intent behind chapter 60.04 RCW.

"As a general rule, structures of a permanent character erected on land by the owner in fee simple are presumed to be built for the purpose of improving the land and to become a part of the realty, in the absence of evidence [to the] contrary." *Cutler v. Keller*, 88 Wash. 334, 337, 153 P. 15 (1915). In the context of a lease, an improvement erected by the lessee becomes part of the underlying land absent an agreement to the contrary. *Murray v. Odman*, 1 Wn.2d 481, 485, 96 P.2d 489 (1939) (building erected by lessee became part of land where lease provided lessee would construct building but contained no provision denoting character of building) (citing *Toellner v. McGinnis*, 55 Wash. 430, 104 P. 641 (1909)); *see also Pier 67, Inc. v. King County*, 71 Wn.2d 92, 94, 426 P.2d 610 (1967) (buildings permanently erected by lessee on property leased from the State of Washington "become a part of the realty as soon as constructed" where "[t]he lease does not provide that the improvements are to be the property of the lessee") (citing *Murray*, 1 Wn.2d at 485; *Toellner*, 55 Wn. 430). Notwithstanding the

common law default rule, however, a lease controls where it plainly states that improvements constructed by the lessee are to remain its personal property during the term of the lease. *See, e.g.*, *Wash. Mut. Sav. Bank v. Dep't of Revenue*, 77 Wn. App. 669, 671-72, 893 P.2d 654 (1995) (pursuant to the language of the lease, improvements constructed by lessee were its personal property for 99-year lease term and would become property of lessor at expiration of lease).

Here, the concession agreement is evidence that is "contrary" to the common law default rule. The agreement clearly states that the improvements are to remain BIA's personal property for its duration and, accordingly, the agreement controls.[2] I would hold that the improvements are not part of the underlying land and, therefore, conclude that RCW 60.04.061 does not apply to RV's lien because it is not "upon any lot or parcel of land." In reaching the opposite conclusion, the Court of Appeals' reasoning conflicted with the terms of the agreement and contradicted the common

[2]In pertinent part, the concession agreement provides that during the term of the agreement, BIA owns the improvements it develops and constructs upon the real property, stating, "any and all development and construction of improvements to the Premises are owned by CONCESSIONAIRE during the term of this Agreement." Clerk's Papers (CP) at 263. In addition, "the agreement designates improvements as personal property." Majority at 15 (quoting *Haselwood*, 137 Wn. App. at 887); *see* CP at 275, 277.

[3]The Court of Appeals, without citing any authority, erroneously concluded that RV's lien is "'upon a parcel of land,' within the meaning of RCW 60.04.061." *Haselwood*, 137 Wn. App. at 887. To reach this conclusion, the Court of Appeals wrongly reasoned that the ice arena is "permanently situated on the City's real property" and "[u]nder these circumstances . . . the improvement cannot . . . be treated as anything but a permanent structure." *Id.* It is my judgment that the Court of Appeals erred in its reasoning for at least two reasons. First, its reasoning conflicts with the terms of the concession agreement that provide the "lender is entitled to remove the

law.[3]

In addition, the Court of Appeals' decision conflicts with the intent of the legislature as evidenced by the legislative history and terms of chapter 60.04 RCW. The legislative history of chapter 60.04 RCW demonstrates that RCW 60.04.061 does not apply to liens upon improvements. I reach that conclusion based on Laws of 1991, chapter 281, which replaced the previous priority statute, former RCW 60.04.050 (1989) (gave priority to"[t]he liens created by this chapter"), *repealed by* Laws of 1991, ch. 281, § 31, with the current priority statute, RCW 60.04.061 (gives priority to "[t]he claim of lien created by this chapter upon any lot or parcel of land"), and added the section authorizing liens upon improvements, RCW 60.04.021. Laws of 1991, ch. 281, §§ 2, 6, 31.

"[T]he legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment." *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976) (citing *Knowles v. Holly*, 82 Wn.2d 694, 513 P.2d 18 (1973); *Roza Irrigation Dist. v. State*, 80 Wn.2d 633, 497 P.2d 166 (1972); *Kelleher v. Ephrata Sch. Dist. No. 165*, 56 Wn.2d 866, 355 P.2d 989 (1960)). Thus, we presume that the legislature intended to change the priority statute when it narrowed its scope from "[t]he liens created by this chapter" to "[t]he claim of lien created by this chapter upon any lot or parcel of land."

Improvements on the Premises." CP at 277. Second, the Court of Appeals' reasoning contradicts the common law by not giving effect to the agreement's provision that designates the improvements as personal property. *See id*.

Given that the legislature made this change contemporaneously with its enactment of the statute establishing the right to claim liens upon improvements, we should presume that the legislature intended to exclude liens upon improvements from the scope of the priority statute. The current priority statute should, therefore, be construed as not applying to liens upon improvements. As such, the Court of Appeals' opposite conclusion is in conflict with this legislative history.

Furthermore, differences in statutory terms within chapter 60.04 RCW evidence legislative intent that RCW 60.04.061 does not apply to liens upon improvements. "[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984) (citing *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981)). Here, the Court of Appeals' conclusion is undermined by the legislature's use of the statutory language "claim of lien created by this chapter upon any lot or parcel of land" in RCW 60.04.061, taken together with its use of the terms "lien upon the improvement" in RCW 60.04.021 and "lot, tract, or parcel of land which is improved" and "land upon which the improvement is situated" in RCW 60.04.051. The different language used within chapter 60.04 RCW reveals the legislature's intent to distinguish land from improvements. Thus, the Court of Appeals' conclusion conflicts with the intent of the legislature that land is separate and distinct from improvements for purposes of chapter 60.04 RCW.

For the aforementioned reasons, I conclude that RCW 60.04.061 does not apply to RV's lien on the improvements. I would accordingly hold that RV's lien does not relate back pursuant to the statute and, therefore, is inferior to the Haselwoods' deed of trust.

ATTORNEY FEES

Although I agree with the result the majority reaches regarding attorney fees, I depart from its reasoning because it is based on the erroneous conclusion that RV did not comply with RAP 18.1. Majority at 16. Regardless of whether this court affirms or reverses the Court of Appeals' decision regarding priority, I would deny the parties' requests for attorney fees because neither party is the "prevailing party in the action" under RCW 60.04.181(3). The prevailing party will not be determined at least until the Court of Appeals, on remand, decides the removal question. *See Haselwood*, 137 Wn. App. at 888 ("[B]ecause we conclude that the trial court erred in finding the Haselwoods' deed of trust senior to RV Associates' mechanics' lien, we do not address RV Associates' argument that it may remove its improvements regardless of priority.").

The majority's reasoning under RAP 18.1 clearly conflicts with the precedent established by this court. Specifically, the majority erroneously concludes that RV is not entitled to attorney fees from this court "because it did not devote a section of its opening brief to attorney fees." Majority at 16. This court has held, however, that a party may comply with RAP 18.1 in this court by devoting a section of its supplemental brief to its attorney fees request. *See, e.g., Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 293, 87 P.3d 1176 (2004) ("[Petitioner] complied with RAP 18.1(b) by devoting a section of its petition for review and supplemental brief to its attorney fee request."); *Allison v. Housing Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34

(1991) ("[Petitioner] has complied with the procedural requirements of RAP 18.1" where "in her supplemental brief, [she] requested attorney's fees and costs."). This is true even where the party failed to request attorney fees in its opening brief to the Court of Appeals. *See, e.g., Barnett v. Buchan Baking Co.*, 108 Wn.2d 405, 408, 738 P.2d 1056 (1987) (Respondent's "[f]ailure to comply with RAP 18.1(b), (c), and (d) precluded an award [of attorney fees] in the Court of Appeals[, but respondent] has complied with RAP 18.1 in this court and is entitled to fees here."). Thus, a party may be awarded attorney fees in this court even if it is precluded from an award of attorney fees in the Court of Appeals. Because RV devoted a section of its supplemental brief to attorney fees, the majority errs in concluding that RV failed to comply with RAP 18.1 in this court.

CONCLUSION

I dissent from the majority's affirmance of the Court of Appeals' conclusion regarding the priority question. I would hold that RCW 60.04.061 does not apply to RV's lien on the improvements and, consequently, that RV's lien is inferior to the Haselwoods' deed of trust. In addition, I would deny RV attorney fees here because it is not the prevailing party—not because of what the majority claims is its failure to comply with RAP 18.1.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Charles W. Johnson